E.D.N.Y.
98-cr-845
05-cv-3421
Korman, J.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse at 500 Pearl Street, in the City of New York, on the 13th day of July, two thousand seven,

Present:

Hon. Chester J. Straub,
Hon. Barrington D. Parker,
Hon. Richard C. Wesley,
Circuit Judges.

Filed
Jul 13 2007

HECTOR SOTO,

Petitioner-Appellant,

—v.—

07-0950-pr

UNITED STATES OF AMERICA,

Respondent-Appellee.

The Government moves for summary affirmance of the district court's order denying the Appellant's motion filed pursuant to 28 U.S.C. § 2255. Upon due consideration, it is ORDERED that the Government's motion is GRANTED. Appellant's sole argument on appeal is that *United States v. Booker*, 543 U.S. 220 (2005), applies retroactively to cases on collateral review. However, this Court has specifically held, in *Guzman v. United States*, 404 F.3d 139 (2d Cir. 2005), that *Booker* does not apply retroactively to cases on collateral review. As such, there are no non-frivolous issues on appeal, and summary affirmance is appropriate. *See United States v. Torres*, 129 F.3d 710, 717 (2d Cir. 1997).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: /s/ LUCILLE CARR

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

HECTOR SOTO,

Petitioner,

MEMORANDUM
AND ORDER
05-CV-3421(ERK)

—against—

UNITED STATES OF AMERICA,

Respondent.

Korman, Ch. J.

The petition for a writ of habeas corpus is denied on the ground that it was not timely filed. The exception to the one year period of limitation contained in 28 U.S.C. § 2255 for claims asserting "a right that has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review" does not save the petition from dismissal. Specifically, in *Guzman v. United States*, 404 F.3d 139 (2d Cir. 2005), the Second Circuit explicitly held that *Booker* is not retroactively applicable to cases on collateral review. While the Supreme Court granted a petition for a writ of *certiorari* to consider the issue in a case in which the Ninth Circuit reached the same conclusion, it ultimately resolved the case on the ground that the district court lacked juris-

diction to entertain the petition (the second one filed by petitioner), because he did not obtain an order authorizing him to file it. *Burton v. Stewart*, 127 S.Ct. 793 (2007).

The issue whether to grant a certificate of appealability is a difficult question. On the one hand, the issue has been resolved adversely to petitioner by the Second Circuit. On the other hand, the Supreme Court concluded in *Burton v. Stewart* that the issue is worthy of Supreme Court review. Under these circumstances, the appropriate course seems to me to appoint counsel and grant a certificate of appealability.

The United States Attorney, perhaps without objection by petitioner (other than a caveat preserving the issue), can move for a summary affirmance and petitioner can then seek a petition for a writ of *certiorari*.

Conclusion

The petition is denied. I appoint Paul Schoeman, Esq., Kramer, Levin, 1177 Avenue of the Americas, New York, NY 10036, to represent petitioner and I grant a certificate of appealability.

Brooklyn, New York
March 6, 2007

SO ORDERED:

/s/ EDWARD R. KORMAN
Edward R. Korman
United States Chief District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA 98-CR-845 (ERK)

—v.— October 22, 1999
Brooklyn, New York

HECTOR SOTO,
Defendant.

TRANSCRIPT OF CRIMINAL CAUSE FOR SENTENCING BEFORE THE HONORABLE EDWARD R. KORMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: LORETTA E. LYNCH, ESQ.
UNITED STATES ATTORNEY
BY: JILL FEENEY, ESQ.
PAMELA CHEN, ESQ.
ASSISTANT U.S. ATTORNEY
225 Cadman Plaza East
Brooklyn, New York 11201

For the Defendant: JORGE SANTOS, ESQ.

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Court Transcriber: LINDA FERRARA
TypeWrite Word
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356 Eltingville Boulevard
Staten Island, New York 10312

Proceedings recorded by electronic sound recording, transcript produced by transcription service

THE CLERK: *The United States of America v. Hector Soto*. Would counsel please note their appearances for the record.

MR. SANTOS: On behalf of —

MS. FEENEY: Go ahead.

MR. SANTOS: On behalf of Mr. Soto, Jorge Santos, 118-35 Queens Boulevard. Good afternoon, Your Honor.

THE COURT: Good afternoon.

MS. FEENEY: Jill Feeney and Pam Chen for the Government. Good afternoon.

THE COURT: Good afternoon.

MR. SANTOS: Judge, my client wishes to sit down at the defense table. He's a little bit nervous.

THE COURT: He could sit down closer to you. Pull up a chair right next to you. All right, Mr. Soto, have you had an opportunity to read the Presentence Report?

THE DEFENDANT: Yes, sir.

[Pause in proceedings.]

THE DEFENDANT: Yes, sir, I have.

MR. SANTOS. Judge, before we continue, I just want to clear up one matter. I believe, Your Honor, I faxed over and I also mailed to Your Honor my letter to you regarding the sentencing of my client.

THE COURT: Yes.

MR. SANTOS: Also, there have been two letters that were faxed over to your chambers; one from my client's former employer and co-worker that were dated some time last week but I actually received them on Tuesday of this week.

THE COURT: I have one from a Mr. Thomas Woods.

MR. SANTOS: Okay and I have one from —

THE COURT: And I have another —

MR. SANTOS: — Philip Sanchez. I don't know if Your Honor wants to read it.

THE COURT: I don't —

MR. SANTOS: But I would rather read it for the record.

THE COURT: All right. Is this it? I can't read the handwriting. Is this it?

MR. SANTOS: That's it.

THE COURT: Yes.

MR. SANTOS: Yes, Judge.

THE COURT: I can read his handwriting.

MR. SANTOS: Okay.

THE COURT: But I couldn't read his signature.

MR. SANTOS: Okay.

THE COURT: Because he does actually say in the last paragraph in writing that I can read —

MR. SANTOS: Just so, Your Honor —

THE COURT: — what his name is.

MR. SANTOS: So, Your Honor did receive the letters?

THE COURT: Yes.

MR. SANTOS: And read them?

THE COURT: Yes.

MR. SANTOS: Very good. Okay, let me just read the letter that Your Honor received yesterday from my office. it's a five-page letter from — excuse me, a four-page letter from Phil Sanchez, which was my client's supervisor at the time that he was employed by the Border — United States Border Patrol. It starts off October 5, 1999, Page 1.

"I first encountered Hector Soto during the beginning months of 1996. He had been released from the Field Training United of the Los Gallos Arizona Border Patrol Station. He had volunteered to work the permanent midnight shift. I was a supervisor assigned to that shift. I was Hector's first time supervisor for the remainder of 1996, all of 1997 and until March 31, 1998.

"At that time, there was a unit shake-up and Hector went to the Flex Unit. I was Hector's rating supervisor for the rating year April 1, 1997 through March 31, 1998. Hector earned an overall rating of excellent for that year. My first impression of Hector was that he was a mild mannered, quiet type. He was a hard worker and would follow orders pretty well. I did have to counsel him a few times for unsafe practices.

"On one occasion, he had actually turned his hand held radio off and approximately twenty to thirty aliens were seen on a night scope running right past them. He never saw them. On several occasions he was yelled by me for leaving his assignment area without permission.

"Any time another agent would call for help, Hector would respond. It didn't matter how far away the call for help came from, Hector would go. At that time, we were apprehending up to three hundred undocumented aliens per shift with from twelve to eighteen agents. I had to keep tight control over my people for officer's safety reasons. I had to know who was where and what they were doing at all times.

was impossible to hide from me and if you weren't where you were supposed to be there, there would be hell to pay. I remember screaming at Hector so loud that I would accidently have spit fly out of my mouth on to him. He would just keep that calm look on his face and very politely tell me that he understood what I was just — by what I had just barked. Hector very quickly learned to inform me of all of his movements out of his area and he did from them on.

"As I did — as I said, Hector was always the first one to respond to fellow agents in distress. On one occasion, Agent Greg Widner, W-I-D-N-E-R, was a —"

THE DEFENDANT: Winder.

MR. SANTOS: Excuse me?

THE DEFENDANT: Widner.

MR. SANTOS: Winder. "Was attempting to apprehend a group of five suspected bandits in the Grand Avenue tunnel entrance. This tunnel goes underground directly from Mexico and at that time, was always filled with glue sniffing, paint sniffing bandits who preyed off the hundreds of undocumented aliens trying to enter the United States.

"Anyway, these five suspected bandits attempted to assault Agent Widner. Agent Soto, immediately upon arrival jumped into the tunnel entrance and put an immediate end to the confrontation. In that incident, Agent Widner was intentionally bitten by one of the suspects who later claimed to have AIDS.

"On another occasion he was — it was reported to me that aliens were being robbed at knife point and that a woman was being raped at knife point inside the same tunnel system described earlier. It is our policy that management cannot order an agent into the tunnel because of

the extreme danger within. Aside from the bandits, this tunnel was — which comes directly from Mexico," — there's a little typo there, Judge — "carries raw sewage and has been tested positive for diseases, many diseases.

"As I proceed to the tunnel entrance to enter alone, Agent Hector Soto arrived at my location. He volunteered to enter the tunnel with me. The two of us waded through approximately three and a quarter mile foot deep raw sewage in total darkness. Hector did this with little or no regard for his own safety. He continually put his life on the line for all of us. We never did find the rape victim.

"I have seen Agent Soto interacting with apprehended aliens in a very soft spoken professional manner. I've seen him hold their babies as if they were his own. I've seen him helping old ladies into and out of border patrol vehicles. I've seen him playing with the children, helping them to relax during some very, stressful times. I've also seen Agent Soto chase down and apprehend aliens and narcotics smugglers and bring them to justice. And always, even under stress, he would act in a noticeably professional manner. I always believed this to be a rare and valuable quality an agent.

"In conclusion, Hector Soto was a most competent and very excellent border patrol agent. I wish he were back here. I would work with him tomorrow in a heart beat. My name is Philip Sanchez. I am a supervisory patrol agent and I have been stationed in Los Gallos, Arizona since March of 1994. I've been a border patrol agent of the United States Border Patrol for twenty-one years. I swear that the aforementioned report is true and correct to the best of my knowledge and is signed Philip Sanchez and dated October 5, 1999."

I read that letter, Judge, because that was the general feeling of my client. I, myself, went to Arizona to speak

to a number of agents who the Government had interviewed regarding this case. All of them said the same thing about Hector. They were all shocked about the allegations in this case, shocked about what he was charged with doing between 1992 and 1994.

They've all called my office, some of them are a little reluctant to write letters because of their position. But all of them have been in contact with my office from the time that Mr. Soto was arrested in June of 1998.

I wrote a letter to Your Honor basically stating that Your Honor has the authority to depart from the recommended sentence that's in the Probation Report and I think that you should. And the reason, I think is obvious from these letters and also, I think, from the testimony that came out in trial from Troy Turk, another agent from Border Patrol who testified about taking Mr. Soto after a — I believe it was a funeral or some kind of a mass that was held for an agent that had been murdered in the dessert a couple of days before my client's arrest.

You also heard from Tripp Peterson, a close friend and roommate of my client's who had known my client for approximately two years and had known him from — he's known my client since July of 1996 and there were allegations made here that when my client confessed that he had told Tripp what had occurred and I put him on the stand for those purposes. And, again, I spoke to Tripp at length. You know, he wanted to know from me whether my client was guilty and we had a whole conversation about whether he was guilty or not guilty and he was a little apprehensive in coming to testify and I told him just say the truth. If he told you he did it, come in. You know, I'm not going to use you obviously for trial and I'm sure the Government would but he was honest with me and he came in and subjected himself to some pretty intense cross-examination, even though he knew that he

was going to be subjected to that intense cross-examination. We had discussed that prior to his testimony.

I mean, what else can I say? I mean, in addition to my client's job as an agent, I mean, just — his conduct as an agent, Your Honor, I think Your Honor has to recognize that. That based on what his supervisor wrote to you and also the testimony in this case that he conducted himself in an exemplary manner. He also lived his life after February of 1994, which is when the last incident happened that the Government proved in this case, he immediately got himself a job. I mean, he did this without knowing that he was under investigation. He did this without knowing that he was going to be arrested, unlike a snitch or an informant that gets arrested, has lived a life of crime up to the point of his arrest and then all of the sudden he begins to cooperate with the Government in order to get leniency from the Government or from the Court.

My client didn't do that. You know, he voluntarily, you know, changed his life from what the prosecution proved in this case and if there is somebody that deserves to be sentenced to something much less than what Probation has recommended, it's Hector Soto. I mean, he doesn't deserve to go to jail for the rest of his life.

THE COURT: It's not a recommendation. It's the guidelines.

MR. SANTOS. I understand that, Judge, but you have the authority based on the case law that I cited in my letter to depart based on extreme rehabilitation. I mean, and this is extreme rehabilitation. This is a case where a defendant rehabilitated himself and contributed to society. I think no one can deny that, not even the Government.

So, you know, hopefully Your Honor will sentence my client to something where he would be able to leave — get out of jail and live some kind of life. He does have a young daughter, a wife. He has a family who has supported him from the very beginning of this case and I hope Your Honor takes into consideration what I requested in my letter and also, what his co-workers have testified to and the letters that Your Honor received.

THE COURT: Mr. Soto, do you wish to speak before I impose sentence?

THE DEFENDANT: Yes. May I stay seated, sir?

THE COURT: Yes.

[Pause in proceedings.]

MR. SANTOS: Judge, may my client have a minute to compose himself?

THE COURT: Yes.

MR. SANTOS: Can he go in the back for five or ten minutes, Judge?

THE COURT: Yes.

MR. SANTOS: Your Honor?

THE COURT: Yes.

[Off the record.]

THE DEFENDANT: Good afternoon, Mr. Korman, ladies and gentlemen of the Courtroom. I know that I am before you today, Mr. Korman, to get sentenced. I would like to thank you, Mr. Korman, for your patience prior to, during and after my trial. I would also like tot hank my family, my wife, my daughter, my mother and my father and my brother, et cetera, for their patience, love,

support and dedication throughout these seventeen months.

Let's go back for a few minutes. Let's start with 1982 when I was ten years old when I commenced military school and graduating in 1990 at the age of eighteen. While at military school I achieved very high goals. Besides graduating and being on the Dean's list, most important goal which I achieved as being a proctor which allowed me to help other children younger than myself through many rough times, being homesick, death in the family and with classes.

By achieving a full scholarship to college to play basketball really made me believe that hard work really pays off. Transferring to St. John's University allowed me to reunited with my family to continue my education.

In 1992, me and my wife changed my life and the meaning of dedication. I asked for Maria to marry, and now my wife, to marry me in '94. My precious little girl was born in August of 1995, making us a more loving, closer family. In December of '96, Maria and I got married. We are a very loving, caring, family but this incarceration has kept us apart.

Since '94, I have been gainfully employed by numerous employers; Guess Factory Outlet, Bannister Shoes, The Department of Energy in D.C., where I dealt with secret, top secret confidential material, receiving a Q Clearance which is the most profound, enduring, background investigation that can be performed by the Government, interacting with Government personnel as high as the Department of Energy Secretary, Hazel O'Leary, later gaining employment with INS, the U.S. Border Patrol which is the most sophisticated, delicate, responsible and enjoyable employment one could ask for.

I will not go into depth about my duties, enjoyment, likes or dislikes about Border Patrol because I won't fin-

ish today. I will say that I have not only been separated from my immediate family but I've also been separated by my second family, a family unlike no other you can be a part from. A family which consists of hundreds and hundreds of true, honest loving brothers.

Prior to my arrest, I was living an exceptional life, providing love, happiness, security and a future for my family at the age of twenty-six and being where I was made me feel very proud of what I was doing; providing for my family, providing assistance to my country.

To conclude, Mr. Korman, I am twenty-seven years old. My wife is twenty-four and my beautiful daughter is four. I have stated the above because I know you must sentence me today to something. Please, Mr. Korman, allow me to have a life when you decide my sentencing. Allow me to have a life with my daughter and wife. Mr. Korman, sentence me to my merit. Thank you.

MS. FEENEY: Your Honor, just briefly. We've submitted papers on this issue but the Government opposes the motion based on extraordinary rehabilitation because legally, you have to look at the whole chain of events that is from the date of the murder, through the trial, and although the Government is not disputing that the defendant in this case became a border patrol guard and was indeed a good one, I think you have to look at the conduct that happened at trial, including the defendant's perjury and his use of the death of a fellow agent to try to explain away his confession, Your Honor.

He, more than anyone else, I think, as a law enforcement official who prosecuted people knows the importance of the oath and knew the importance of the oath and I think if you look at everything together, the extraordinary rehabilitation really implies coming to terms with what you've done. If you look at the whole thing, he's not met that standard here, Your Honor.

THE COURT: And you think a life sentence is appropriate here?

MS. FEENEY: Your Honor, I do.

[Pause in proceedings.]

THE COURT: I don't. Although the downward departure here is made extremely difficult by the fact that the defendant took the stand at his trial and did not testify truthfully. Up until that point in a trial, as I thought about what the sentence would be, I thought that this was an extraordinary case that would have warranted a downward departure, in part because of the extraordinary rehabilitation. In part, because when confronted following his arrest, he confessed immediately and in part, because my impression was that while we're all responsible for the choices that we make in life, he was someone who have could have gone the right way, was on a path to go the right way and may have very well have gone the right way, if it wasn't for his brother.

And I was quite frankly flabbergasted when he took the witness stand. It was a stupid decision and it's one that I am going to take into account in imposing sentence but it's not a factor that I think ought to result in the imposition of a life sentence.

I start off with the — and I also don't intend to ignore the guidelines here. I start off with what the guideline sentence would have been in this case if he had pled guilty. His current offense level is a 45 which is a mandatory life sentence under the guidelines. If he had pled guilty in a timely fashion, it would have been a 40, in part because of the 3 points off for a timely plea of guilty and in part because we would have never come to the perjury that was committed at trial. And that does, to a degree and has to impact on what a rational sentence would be here.

At a level 40, the guideline range was — is 292 to 365 months and it would have been a level from which I would have downwardly departed because of the circumstances here. And the consequence of the perjury — I don't care about the not pleading guilty. I don't think people should be punished for not pleading guilty but because of the perjury here, I'm not going to downwardly depart from that guideline range. In my own view, but for that, a sentence of twenty years might have been appropriate which is 240 months.

[Pause in proceedings.]

THE COURT: Do you want to call the nurse?

MR. SANTOS: Yes, Judge.

[Nurse came to help Defendant that passed out but was not unconscious upon her arrival.]

MR. SANTOS: Judge, my. client is ready to proceed.

THE COURT: I think I was saying that I might have considered downwardly departing to twenty years, perhaps fifteen but no lower than that because in my own view, I should be guided in part by the fact that fifteen years to life is what the minimum sentence is for murder in New York in a non-capital case; fifteen to life and indeed, as it happens, I am working on a habeas corpus case which involved the murder committed during the course of a robbery of a grocery store in which an innocent person was killed by someone who I suspect was roughly the same age as the defendant and which the Appellate Division reduced the sentence to twenty years to life.

But I'm not going to downwardly depart beyond the guideline range of 292 to 365 months. I think there's some merit to the Government's position that one cannot

ignore in this overall scheme what happened at the trial. On the other hand, I don't think it — what happened wipes out everything else and results in the imposition of a life sentence.

So, I'm going to sentence the defendant to the custody of the Attorney General for a period of 292 months, a period of five years supervised release and a special assessment of $300.00 which is — goes into a victim's compensation fund.

Notwithstanding his rehabilitation and the other extenuating circumstances I mentioned but cannot be lost sight of the fact that this was a cold-blooded murder and that the defendant is also being sentenced as well for his participation in drug distribution.

Mr. Soto, if I may, you have a right to an appeal both from the trial and the sentence and if you can't afford to pay the filing fee for the notice of appeal — to file the notice of appeal, I would allow you to do so without paying the filing fee. Do you understand that? Do you understand that? You have to speak.

THE DEFENDANT: Yes, sir.

THE COURT: All right. You'll file the notice of appeal?

MR. SANTOS: Yes, sir.

THE COURT: All right.

MS. FEENEY: Thank you, Your Honor.

* * * * * *

I certify that the foregoing is a court transcript from an electronic sound recording of the proceedings in the above-entitled matter.

/s/ LINDA FERRARA
LINDA FERRARA

Dated: March 12, 2000

28 U.S.C. § 2255

Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

UNITED STATES CONSTITUTION, AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.